United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

77-1009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

EDWARD V. MASE,
Appellant

On Appeal From The United States District Court For The District Of Connecticut, Honorable Jon O. Newman, District Judge

PETITION FOR REHEARING

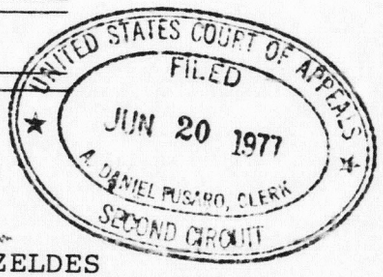

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TABLE OF AUTHORITIES

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Defendant seeks review in this Court after decision only with reluctance, but he does so because the Court has affirmed a judgment of conviction confining him to prison for ten years on a basis different, at least in emphasis, from the claims set forth by the Government here and in the Court below and by Judge Newman in his instruction to the jury. Since this Court's conclusion may be based on a fundamental misapprehension about the record in this case, defendant urges reconsideration by the Court.

I.

In briefs and at oral argument, we contended that there was not sufficient evidence or proper jury instructions for the jury to conclude that the gambling debt of June 6, 1976, owed by Dwyer to Gianotti constituted an extension of credit, as defined by Congress in 18 U.S.C. §891(1) and without which element there is no federal offense. Both the Government and the court below focused on the gambling debt in arguing against and ruling upon defendant's contentions (Tr. 423, 425, 426, 494, 510).

On appeal, this Court has now realigned the focus and, in effect, adopted a new approach so that defendant's conviction is affirmed on a basis not urged in the court below or by the Government here. In finding that the jury could infer a tacit agreement to defer payment before any debt existed and before the event upon which the bet was placed occurred (slip. op. 4041), this Court has abandoned the focus adopted in the District Court and instead concentrated on the making of the bet rather than the debt resulting from the bet. What was suggested neither by the Government nor by the court below is now set forth by this Court as the basis for its judgment of affirmance:

> "...that when Dwyer placed the bets with Gianotti on June 5-6 there was at that time a tacit agreement between them that Dwyer was deferring repayment of Gianotti's debt if Dwyer won and that Gianotti was deferring repayment of Dwyer's debt if Dwyer lost." (Slip. op. 4041).

The error of this suggestion from defendant Mase's point of view is two fold:

(1) The suggested type of agreement to repay, if made in advance

of the existence of the debt, is necessarily an agreement to repay a contingent debt, yet the statute speaks only of "debt" not contingent debt, even though §891(1) is indeed broad. Certainly, such an interpretation runs afoul of the time honored admonition, restated by the Supreme Court on the very day this Court's decision was rendered that in construing statutes the text of the statute is the first source of review and if there be an ambiguity it "'... should be resolved in favor of lenity.'..." Scarborough v. United States, ___ U.S. ___, 21 Cr.L. 3062, 3063 (June 6, 1977).

(2) The theory advanced by the Court here for the first time was not explained to the jury. We recognized that the Court concluded, in discussing defendant's claim regarding the loan theory, that Judge Newman's charge "was adequate" (slip. op. 4040); but at no place did Judge Newman explain that the "agreement" to defer payment required by §894 could be entered into before the debt arose or that the pattern of betting could constitute a tacit agreement to defer payment of any contingent debt. Certainly, if such a charge were given, it would also have been necessary to explain that the jury must acquit if it found that the parties to the bet had no agreement that payment for lost bets could be deferred or that the parties agreed the lost bets would be paid at the conclusion of the event wagered upon (A136-137). This, of course, the jury was not told. The defect, then, of this Court's suggested theory of an agreement is that the jury was uninstructed on its essentials. See United States v. Singleton, 532 F.2d 199, 204-7 (2d Cir. 1976).

II.

The inadequacy of the charge in relationship to this Court's new theory of what constitutes an agreement is compounded by the Court's treatment of the loan theory. While this Court does not deny that a loan, in its accepted, understood meaning, Palmer v. United States Civil Service Commission, 297 F.Supp. 495, 537 (S.D. Ill. 1961), reversed on other grounds, 297 F.2d 450 (7 Cir.), cert. denied, 369 U.S. 849 (1962), entails an advance of funds (slip. op. 4040), it concludes:

> "We think Congress intended a broad definition." (Slip. op. 4040).

Here again the error of the Court's view is two fold:

(1) The Court rejects the common meaning of an undefined term--loan--,states Congress intended a "broad definition" (slip. op. 4040) and then fails to define the term.* Certainly such a procedure runs afoul of the vagueness doctrine. Since Congress has not defined the term, since this Court has rejected the common meaning of the term, and since this Court has not or cannot define the term, how can the statute possibly survive the Supreme Court's often-cited admonition in Connally v. General Construction Co., 269 U.S. 385, 393 (1926):

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* This Court discounts defendant's reliance on "cases involving tax treatment of a transaction, the application to an Illinois official of the Hatch Act,...and the interpretation of a commercial contract to support his argument that a loan always involves 'the delivery of property or the advance of funds...' [because] [t]hese cases are not...determinative in construing a criminal statute." Slip. op. 4040. Yet, where Congress has left a basic term in a criminal statute undefined, is it not pertinent in construing the statute that all of these widely varied cases are uniform in their construction of that term? And if Congress did not intend "loan" to have its common meaning as evidenced by these cases involving diverse subject matters, why did it use the term without defining it?

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose in advance what course is lawful for him to pursue. Penal statutes prohibiting a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." (Emphasis added).

In adopting this undefined, "broad" view of the loan aspect of an extension of credit, this Court does not explain exactly what it is that could be a loan. Is the gambling bet the possible loan? Or is the gambling debt arising after the sporting event took place the possible loan?

(2) Although, as noted, we recognize that the Court concluded that Judge Newman's instruction was adequate on the loan theory, we urge the Court to reconsider in this regard. The charge referred to the "transaction"--without specifying whether it referred to the gambling bet or the gambling debt--as capable of being a loan (slip. op. 4041). Here again, then, the jury--even if the loan theory could possibly go to the jury--was uninstructed on an essential element. United States v. Singleton, supra, 532 F.2d at 204-7.

Conclusion

For these reasons, then, this petition for rehearing should be--and defendant Mase requests it be--granted.

Dated at Bridgeport, Connecticut, this 18th day of June, 1977.

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DOCKET NO. 77-1009

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CERTIFICATE OF SERVICE

I, Jacob D. Zeldes, Counsel to defendant-appellant Edward V. Mase in the above-entitled matter, hereby certify that on the 18th day of June, 1977, I served the attached Petition for Rehearing upon the attorney for the appellee by depositing copies in the U.S. mails, postage prepaid, addressed to him at the following address:

Paul E. Coffey, Esquire
Special Attorney
U.S. Department of Justice
450 Main Street
Hartford, Connecticut 06103

Dated at Bridgeport, Connecticut, this 18th day of June, 1977.

Jacob D. Zeldes